NO. 46711-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT E. ACKERSON
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Christopher Melly, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The order requiring Mr. Ackerson to pay fees and restitution that he will never be able to afford violates the Fourteenth Amendment guarantees of equal protection and due process.

2. The sentencing scheme does not contain sufficient safeguards to prevent imprisonment for inability to pay fees and restitution when the offender is supervised by the Department of Corrections (DOC).

3. **ISSUE 1:** Due process and equal protection prohibit imprisonment based on an indigent person's inability to pay LFOs. A person supervised by DOC can be imprisoned for failure to pay without any opportunity to demonstrate that the failure resulted from poverty. Did the court violate Mr. Ackerson's Fourteenth Amendment rights by ordering her to pay LFOs absent sufficient safeguards to prevent his later imprisonment for inability to pay them?

4. The differential treatment of sentencing violators who are supervised by the court versus those who are supervised by the Department of Corrections violates the Fourteenth Amendment right to equal protection.

5. The statutory scheme creates an arbitrary classification between court- supervisees and department-supervisees, which serves no legitimate governmental interest.

6. **ISSUE 2:** Equal protection requires that similarly-situated persons be treated similarly. Here, because Mr. Ackerson's sentence is supervised by DOC instead of by the court, he can be imprisoned for failure to pay his LFOs with no right to counsel, and will have no opportunity to demonstrate that he is unable to pay because of indigency. Does the disparate treatment of court-supervisees versus DOC-supervisees violate Mr. Ackerson's Fourteenth Amendment right to equal protection?

7. Mr. Ackerson was statutorily entitled to credit for time served in residential treatment.

ISSUE 3. Equal protection requires that similarly-situated persons be treated similarly. Here denial of credit for time served in residential treatment violates equal protection because it is total confinement and other forms of total confinement are credited against incarceration. Does denial of credit for time served in custody violate equal protection?

ISSUE 4. Double Jeopardy prohibits multiple punishments for the same offense. Here, denial of credit for time served in residential treatment punishes Ackerson twice for the same offense. The failure to award credit for participation in the program violates the double jeopardy prohibition against multiple punishments. Does denial of credit for time served result in multiple punishments in violation of protections against double jeopardy?

B. STATEMENT OF THE CASE

Ackerson entered drug court to address his charge simple possession of a controlled substance. RP 8. On July 18, 2014, the trial court ordered Ackerson to report to treatment.

> 2) The Defendant shall immediately report to Olympic Personal Growth Center at 390 E. Cedar Street, Sequim, WA upon release on April 22, 2013.
> July 21,

CP 30-31. Ackerson entered a contract for a DOSA in which he agreed that upon failure to meet the drug court conditions he would permit a stipulated trial based on the police reports. RP 12; CP 31. Ackerson violated conditions of drug court and based on the police reports the trial court found Ackerson guilty of simple possession of methamphetamine. RP 16.

Ackerson stipulated to an offender score of 12. RP 18. Ackerson explained that he did not really relapse but failed to check in with "Stormy". RP 24. Ackerson indicated that he was ready to go to prison and just could not do "the seven meetings seven days a week". RP 25. Ackerson informed the court that he "did grow a lot in drug court". Id. The court agreed that Ackerson made progress. Id.

During sentencing, Ackerson requested credit for all presentence time served while in inpatient treatment for this offense. RP 21. Counsel for Mr. Ackerson appears to reference "several months" as the time in residential treatment. RP 21. The court ruled that the treatment was not

part of the sentence and denied credit for time served in residential treatment. RP 28. The court entered findings and conclusions and issued an order of guilt based on Ackerson possessing a controlled substance while in drug court. CP 24.

LFO's

Mr. Ackerson is indigent but the trial court believed that Mr. Ackerson could earn money even though he was not generally employable. RP 30.

> I don't think he is able to perform full time gainful employment on a reasonably continuous basis in a job that he is able to obtain and retain here in the actual competitive labor market in the community but I think he could get some kind of work that he would be able to make some money doing so I think he is employable.

RP 22. The court permitted Mr. Ackerson to perform community custody service to satisfy his legal financial obligations even though the court also recognized that Mr. Ackerson could not perform community service in lieu of paying fines due to his being on disability. CP 10; RP 31-32. Ultimately, the court ordered Mr. Ackerson to pay $2500 in monthly installments of $25 commencing within 60 days of his release from custody. CP 10. If Mr. Ackerson fails to pay or appear in court, the trial court will issue an arrest warrant for his arrest Supp. CP (Pay or Appear October 2, 2014).

This timely appeal follows. CP 8.

C. ARGUMENTS

1. THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST FOR CREDIT FOR TIME SERVED IN DRUG COURT ORDERED RESIDENTIAL TREATMENT.

a. A defendant is entitled to credit for time spent awaiting trial.

A defendant sentenced to a term of confinement has both a constitutional and statutory right to receive credit for all confinement time served prior to sentencing. *State v. Medina*, 180 Wn.2d 282, 287, 324 P.3d 682 (2014); *In re Personal Restraint of Costello*, 131 Wn.App. 828, 129 P.3d 827 (2006). RCW 9.94A.505(6) provides:

> The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

Id. 1The failure to award credit for time served violates due process, equal protection and the double jeopardy prohibition against multiple punishments. *Costello*, 131 Wn.App. at 832. This court reviews de novo the decision to award credit for time served. *State v. Swiger*, 159 Wn.2d 224, 227, 149 P.3d 372 (2006).“‘Confinement’ means total or partial confinement.” RCW 9.94A.030(8). RCW 9.94A.030(51) defines “total confinement” as

> (51) (“total confinement)” confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government

1 The record does not provide a clear understanding of the number of days Ackerson spent in residential treatment.

for twenty-four hours a day.

RCW 9.94A.030(51).

Mr. Ackerson's pretrial confinement was total confinement in a court ordered treatment facility utilized under contract with the state. RP 21; CP 31. Thus, the trial court's failure to award him day for day credit for the time he served in the residential treatment program violated his statutory and constitutional rights to credit for time served prior to sentencing on this case. RCW 9.94A.505(6); CP 31. Ackerson was not sentenced under the drug court agreement but was later sentenced after a stipulated trial following violation of conditions of the drug court. CP 9, 10, 24.

Under the Sentencing Reform Act of 1981(SRA), a defendant must be sentenced in accordance with the law in effect at the time of his or her offense. *Medina*, 180 Wn.2d at 287) (citing, RCW 9.94A.030). Here, the law in effect required credit for time served in inpatient treatment because Ackerson's treatment met the definition of "total confinement". RCW 9.94A.505(6); RCW 9.94A.030(51).

Moreover, the sentencing court did not have discretion to depart from this mandate because the SRA does not generally authorize discretion, and RCW 9.94A.505(6), provides the mandatory term "shall". *State v. Shove*,113 Wn.2d 83, 89, n. 3, 776 P.2d 132 (1989); *State v. Hale*, 94 Wn.App. 46, 56, 971 P.2d 88 (1999).

> We "generally do not imply authority where it is not necessary to carry out powers expressly granted[,]"

> especially where the "general structure and purpose of the SRA limits the trial court's sentencing discretion and requires determinate sentences." *DeBello,* 92 Wash.App. at 728, 964 P.2d 1192.

Hale, 94 Wn.App. at 55. Accordingly, under the SRA generally, and RCW 9.94A.505(6) and RCW 9.94A.030 (51) specifically, the trial court erred by denying credit for time served while in inpatient treatment.

In anticipation of the state's argument, Ackerson distinguishes *State v. Hale*, the case relied on by the trial court in denying credit for time served. RP 27. *Hale* is inapposite because Hale was sentenced to five months of confinement which the trial court converted to community placement after Hale was sentenced. The trial court held that post-sentencing, Hale could receive credit for time served in inpatient treatment to satisfy his community supervision obligations. *Hale*, 94 Wn.App. at 50-51, 55. Citing, former RCW 9.94A.030(35), the Court of appeals reversed holding that there was no statutory authority to grant credit for time served inpatient **after** sentencing. *Hale*, 94 Wn.App. at 54-55.

Here, Ackerson's inpatient treatment was served prior to sentencing, thus Hale is inapposite and as stated, RCW 9.94A.030(51), provides that he is entitled to credit for time served in residential treatment. Id.

Medina, 180 Wn.2d at 285-289, is instructive on the issue of when treatment satisfies the definition of "confinement". In Medina, the issue involved whether treatment met the definition of "partial confinement".

After Medina was convicted of murder, that charge was vacated, and while awaiting his next trial on manslaughter, Medina participated in a treatment program with CCAP. The Supreme Court analyzed the issue of credit for time served not on the basis of pre versus post-trial confinement, but rather on the basis of whether the 6 hour per day treatment met the definition of "partial confinement", which according to *Medina* meant that "confinement" is equated with "residence". *Medina*, 180 Wn.2d at 289.

The Court held 6 hours per day was not sufficient time each day to qualify as partial confinement but, otherwise the treatment would qualify if Medina spent at least 8 hours per day in treatment because the record established that CCAP was "a facility or institution operated or utilized under contract by the state or any other unit of government. Id.

> If these community options were forms of partial confinement under former RCW 9.94A.030(26) (1991), credit for time spent participating in those programs would not be discretionary. Rather, it would be mandatory under RCW 9.94A.505(6) ("The sentencing court *shall* give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced" (emphasis added)).
>
> This shows that the 2009 legislature perceived a need to expand credit for time served in "county supervised community options."

Medina, 180 Wn.2d at 292.

Ackerson was entitled to credit for time served in residential treatment because it qualified as total confinement under RCEW 9.94A.030(51). RCW 9.94A.505(6).

b. The failure to award credit for Mr. Ackerson's Participation in the residential treatment program violates equal protection.

The Equal Protection Clauses of the United States and Washington Constitutions require similarly situated persons receive the same treatment. *State v. Anderson,* 132 Wn.2d 203, 212-13, 937 P.2d. 581 (1997). Equal protection requires a defendant receive credit for serving time pending appeal on post-trial home detention or electronic monitoring because there is no rational basis for distinguishing between pre-trial and post-trial detention. *Swiger*, 159 Wn.2d 227-29; *Anderson*, 132 Wn.2d at 212-13.

The decisions in *Swiger* and *Anderson* are instructive here. In *Swiger*, the court found that the defendant's global positioning system (GPS) home monitoring constituted home detention, and thus he was entitled to credit for the time spent in such post-conviction home detention despite the fact that the State did not agree to his release. *Swiger*, 159 Wn.2d 224. In *Anderson*, the defendant was convicted of a felony and was released on electronic home monitoring pending appeal. *Anderson*, 132 Wn.2d at 203. The court held that because the statute permitted such credit for pretrial monitoring, there was no rational basis to distinguish between presentence and post- sentence electronic home detention. *Anderson*, 132 Wn.2d at 213.

Similarly, here there is no rational difference between the Olympic program and any other 24 hour confinement. As a result, equal protection requires Mr. Ackerson receive credit for all time in the program prior to

his sentencing on the stipulated trial.

c. The failure to award credit for participation in the program violates the double jeopardy prohibition against multiple punishments.

Double jeopardy principles require that "punishment already exacted must be fully 'credited'" against a defendant's sentence. *North Carolina v. Pearce*, 395 U.S. 711, 718-19, 89 S.Ct. 2089, 23 L.Ed.2d 656 (1969). Thus, double jeopardy demands that all defendants receive credit for time spent in confinement prior to sentencing. *Reanier v. Smith*, 83 Wn.2d 342, 351-52, 517 P.2d 949 (1974). Failure to give credit violates double jeopardy because one incarcerated pending trial may serve a sentence longer than the maximum imposed if credit is not given. Id.

Here, Mr. Ackerson spent time in a residential treatment program awaiting trial. Without an award of credit for that time, Mr. Ackerson runs the risk of doing those days again at the Department of Corrections, thus constituting multiple punishment for the same offense. This would violate his right to be free from double jeopardy.

2. THE COURT VIOLATED MR. ACKERSON'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION BY ORDERING FEES AND RESTITUTION EVEN THOUGH SHE DEMONSTRATED THAT HE WILL NEVER BE ABLE TO PAY THEM.

a. Standard of Review.

Appellate courts review constitutional claims *de novo*. *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 179

Wn. App. 601, 626, 319 P.3d 847 (2014) *review denied*, 180 Wn.2d 1023,328 P.3d 902 (2014).

b. The order requiring Mr. Ackerson to pay fees that he will never be able to afford violates equal protection and due process because the sentencing scheme does not contain sufficient safeguards to prevent his later imprisonment for inability to pay.[3]

Due process and equal protection prohibit an indigent person's imprisonment for inability to pay fees or restitution. *Bearden v. Georgia*,

[3] Courts regularly review pre-enforcement challenges to sentencing conditions. *See e.g. State v. Bahl*, 164 Wn.2d 739, 747, 193 P.3d 678 (2008). A person need not expose him/herself to arrest to be entitled to challenge a statute that violates the constitution. *Id.* Such an issue is ripe for review as long as "the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *State v. Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (*quoting Bahl*, 164 Wn.2d at 751). The same logic applies here. Mr. Ackerson's situation leaves him under the threat that DOC could choose at any time to sanction him based on his inability to pay fees and restitution. Once that happened, he would have no opportunity to demonstrate that his violation had been un-wilfull. He would also not have a right to counsel at a DOC violation hearing. WAC 137-104-060(7). Likewise, the issue Mr. Ackerson raises is purely legal. He demonstrated at sentencing that He cannot pay fees and restitution and will never be able to do so as a result of disability. RP 22-32. No further factual development is necessary. This court should review the merits of this issue. *Valencia*, 169 Wn.2d at 786; *Bahl*, 164 Wn.2d at 751.

461 U.S. 660, 103 S.Ct. 2064, 2072, 76 L.Ed.2d 221 (1983); U.S. Const. Amend XIV. The Washington Constitution also explicitly proscribes incarceration for inability to pay debts. Wash. Const. art. I, § 17.

A sentencing scheme violates these prohibitions if it does not include "sufficient safeguards" to "prevent the imprisonment of indigent defendants." *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992). The *Curry* court addressed former RCW 9.94A.200 (1992). Under that statute, an offender facing incarceration for failure to pay received an opportunity to show cause why s/he should not be imprisoned. *Id.* (*citing* former RCW 9.94A.200 (1992)). The statute at issue in *Curry* also permitted a sentencing court to consider whether the violation was willful. *Id.*

RCW 9.94A.200 has been recodified several times since *Curry*. *See* Laws of 2001, ch. 10, sec 6; Laws of 2008, ch. 231, sec. 56. The current iteration of the statute applies only to offenses committed before July 1, 2000. *See* RCW 9.94B.040, 9.94B.010.

The new sentencing scheme does not fully comply with the "sufficient safeguards" requirements of *Curry*. Under the current scheme, an offender who fails to pay may be sanctioned by either the court or by the department. Only those supervised by the court receive the constitutionally required protections.

RCW 9.94A.6333 applies only to people who are supervised by the court, rather than by DOC. RCW. 9.94A.6333(1). Under *Curry*, it provides "sufficient safeguards" against imprisonment based on poverty. *Curry*, 118 Wn.2d at 918; *see* RCW 9.94A.6333(2)(a) (affording an offender an opportunity to demonstrate good cause why s/he should not be imprisoned); RCW 9.94A.6333(2)(d) (permitting the court to modify the original sentencing order if the violation is not willful).

By contrast, offenders supervised by the department receive no such protections. For offenders under DOC supervision, no statute or regulation affords the opportunity to demonstrate that non-payment was the result of poverty. Nor is there any provision requiring consideration of the offender's willfulness or lack thereof. *See* RCW 9.94A.633; RCW 9.94A.737; WAC chapter 137-104.

Mr. Ackerson cannot pay his fees now and will never be able to do so. RP 11-16. Because he is under DOC supervision, however, he can be sanctioned and imprisoned for failing to pay without any opportunity to demonstrate that his failure was not willful. *See* RCW 9.94A.633; RCW 9.94A.737; WAC chapter 137-104.

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[4] *See In re Bovan*, 157 Wn. App. 588, 593, 238 P.3d 528 (2010) ("RCW 9.94A.633 appears now to control the sanction procedures for violations of any conditions of a sentence.")

The DOC supervision procedures violate equal protection and due process because they do not include sufficient safeguards to prevent imprisonment based on poverty alone. *Bearden*, 461 U.S. 660; *Curry*, 118 Wn.2d at 918. As a result, the trial court should not be permitted to order Mr. Ackerson to pay fees that he will never be able to afford. The order imposing legal financial obligations must be vacated.

c. The disparate approaches toward people supervised by the court and those supervised by DOC violates Mr. Ackerson's right to equal protection by treating her differently than similarly-situated offenders.

Equal protection requires "that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *State Washington Pub. Employees Ass'n v. State*, 127 Wn. App. 254, 265, 110 P.3d 1154 (2005); U.S. Const. Amend. XIV; Wash. Const. art. I, § 12. A law violates equal protection if it creates an arbitrary classification. *Pub. Employees Ass'n*, 127 Wn. App. at 263.

To survive an equal protection challenged under rational basis review:

> ...the challenged law must serve a legitimate state objective, the law must not be wholly irrelevant for achieving that objective, and the means must be rationally related to the objective.

State v. Berrier, 110 Wn. App. 639, 649, 41 P.3d 1198 (2002).

The statutory scheme at issue here serves no legitimate state objective. *Id.* A person supervised by the court is given an opportunity to demonstrate why s/he should not be imprisoned for failure to pay. RCW 9.94A.6333(2)(a). A court supervisee can also ask the court to modify the original sentencing order if s/he is unable to comply. RCW 9.94A.6333(2)(d). A person supervised by DOC, on the other hand, has no statutory or regulatory mechanism to prevent incarceration for a poverty-based violation of a sentencing requirement. *See* RCW 9.94A.633; RCW 9.94A.737; WAC chapter 137-104.

Additionally, court supervisees have a right to counsel at hearings that could result in imprisonment for failure to pay LFOs. *State v. Stone*, 165 Wn. App. 796, 814-15, 268 P.3d 226 (2012). DOC supervisees are explicitly prohibited from representation by counsel at hearings serving the same purpose and carrying the same risks. WAC 137-104-060(7).

The statutory scheme violates equal protection because it creates an arbitrary distinction. *Pub. Employees Ass'n*, 127 Wn. App. at 263. A person who violates his/her sentence because of inability to pay fees and restitution has a means to avoid imprisonment if supervised by a court but not if supervised by DOC. Such a person also has a right to counsel only if supervised by the court. This distinction does not serve a legitimate state interest because it bears no relationship to the objectives of the

Sentencing Reform Act. *Berrier*, 110 Wn. App. at 649. There is no reason why a person's opportunity to defend against incarceration for poverty-based sentencing violations should vary based on the supervising entity.

Mr. Ackerson is under DOC supervision. CP 9, 10. He will never be able to pay the hefty fees and restitution ordered in his case. RP 30, 26-38. But – because he is supervised by DOC instead of by the court – he could face imprisonment without any opportunity to demonstrate that his failure to pay is based on poverty. Nor will he have the chance to be represented by counsel. This arbitrary distinction violates equal protection. *Pub. Employees Ass'n*, 127 Wn. App. at 263; *Berrier*, 110 Wn. App. at 649.

The provision of certain rights only to those under court supervision and not to those under DOC supervision violates equal protection. *Pub. Employees Ass'n*, 127 Wn. App. at 263; *Berrier*, 110 Wn.

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[5] The purposes of the Sentencing Reform Act are to:

> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
> (2) Promote respect for the law by providing punishment which is just;
> (3) Be commensurate with the punishment imposed on others committing similar offenses;
> (4) Protect the public;
> (5) Offer the offender an opportunity to improve himself or herself;
> (6) Make frugal use of the state's and local governments' resources; and
> (7) Reduce the risk of reoffending by offenders in the community.

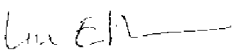
App. at 649. Mr. Ackerson's case must be remanded for resentencing and the fees must be stricken.

D. CONCLUSION

Mr. Ackerson respectfully requests this Court reverse his sentence and remand for credit for time served in residential drug treatment and vacate all LFO's.

DATED this 9th day of March 2015.

Respectfully submitted,



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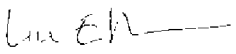

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